
(1929) 02 AHC CK 0026
In the Allahabad High Court

Angan Lal and Others

APPELLANT

Vs

Saran Behari Lal and Others

RESPONDENT

Date of Decision : 28-02-1929

Acts Referred:

Contract Act, 1872 — Section 62

Citation : AIR 1929 All 503 : (1929) ILR (All) 799 : 121 Ind. Cas. 221

Judgement

1. One Jagan Prasad, for himself and as the natural guardian of his three sons, two of whom are among the appellants, executed a mortgage bond for Rs. 10,000 in favour of the ancestors of the respondents to this appeal on 17th July 1915. The suit out of which this appeal has arisen was brought to enforce that mortgage. One of the sons of Jagan Prasad is dead and is represented in this litigation by his wife, Mt. Manbhari, one of the three appellants.

2. Several pleas were taken in defence, but only three of these are pressed before us, and, therefore, need be noticed. The first plea was that the parties agreed that a certain mortgage transaction should be entered into by the parties in satisfaction of not only the bond in suit but also of another mortgage bond, and that being the case, the present suit was not maintainable. The second plea was that there was effected, between the father and the sons a partition in 1911, and, therefore, the present suit for the sale of properties, which fell into the shares of the sons was not maintainable. The third plea was that there was no legal necessity for the loan.

3. On the first point the learned Subordinate Judge found that there was, no doubt, an agreement that a fresh transaction of mortgage and a lease should be entered into, but he held that no documents creating the lease or the mortgage having been executed and completed, it was open to the plaintiffs to maintain the suit. The learned Counsel for the appellants has contended that u/s 62, Contract Act, it is enough if there was an "agreement" to substitute a contract, although no contract was completed in the shape of execution and registration of a mortgage and a lease. We are unable to accept this contention of the learned

Counsel. In the deed in suit we have a contract and a transfer of property. If this transaction is going to be superseded by a contract, that transaction also must be a complete transaction. It should be a contract which is enforceable in law. The substitution, as we have said, must be by a contract and a mere agreement to execute, in future a usufructuary mortgage-deed and a lease cannot be said to be a contract. To put the same thing in different language, the defendants' case is that the bond in suit was to be replaced by a usufructuary mortgage for a sum of Rs. 37,000 which was to be raised under circumstances to Rs. 44, 000. It was further the case of the defendants that there was to be a lease of the mortgaged property in favour of the defendants. These are transactions which can only reach a stage of completed contract on being executed on stamped documents and on being registered. As we read Section 62 there should be an actual substitution of the old contract by a new contract. A mere agreement that there would be in future a substitution would not be sufficient to wipe out the mortgage in suit. "Agree to substitute" is (equivalent) to "agree in substituting". Till the second contract, contemplated, is brought into existence, the old contract will still exist and continue to be enforceable.

4. Let us take, for example, the illustration which one of us put to the learned Counsel for the appellants in the course of the arguments. Suppose that for three years after the completion of the "agreement" relied on by the defendants, nobody took any action. The plaintiffs did not bring any suit for sale and the defendants did not bring any suit for specific performance of the contract. Could it then be argued that, when a suit is instituted, after the end of three years, the plaintiffs' mortgage has become extinguished? We think that such an argument would be utterly untenable. We are of opinion that the learned Subordinate Judge was right in holding that a mere executory contract which has to be specifically enforced to procure the contract and which is to be substituted for the old contract, would not supersede a registered mortgage-deed by which an interest in the property has passed.

5. As regards the question of partition, we are satisfied, for reasons given by the learned Subordinate Judge in his judgment, that the transaction of partition was merely illusory. It was entered into to defeat creditors. Two attempts at defeat of creditors failed. On a third occasion it was expressly pleaded by the defendants themselves, at least by one of them, that the family was joint in spite of the alleged partition. This plea, therefore, fails.

6. As to the legal necessity it has been found that two of the sums out of the nine items which made up the sum of Rs. 10, 000 went to pay off two decrees held by the creditors not only against the father but also against the sons. Various items, in all amounting to Rs. 2,121, were left with the creditors to pay land revenue. Evidence has been produced that these sums were actually paid into the Government Treasury and receipts have been taken. It has been urged that there is no evidence that there was specific necessity for payment of these dues to the Government. There can be no doubt that these amounts were

payable by the father and can be regarded, irrespective of other aspects, as antecedent debts payable by the father. A sum of Rs. 285 was handed over to the father a few days before the execution of the bond to meet the costs of the execution. It has been urged that this was a very large sum and all the money was not possibly required for the purpose. A sum of Rs. 199 15-8 was paid before the Sub-Registrar, and it is urged that no necessity for this loan has been substantiated. This is no doubt true. But where it has been proved that there was justification for raising a loan of Rs. 9,800, it may well be assumed that the father had fall justification for raising the balance also: see *Biswanath v. Jagdeep* [1913] 43 Cal. 342. According to the recital in the deed of mortgage itself which is very full, the family was in a state of perpetual embarrassment. Money was needed not only to pay antecedent debts, to pay land revenue, but also for the upbringing of the sons. We are of opinion that sufficient justification for borrowing the additional sum of Rs. 200 has been made out. Under these circumstances the appeal fails and it is hereby dismissed with costs.